JACKSON COUNTY CIRCUIT COURT

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Chad C. Schmucker
Chief Circuit Judge

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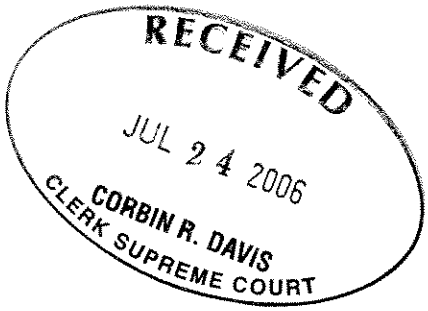
July 20, 2006



Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Dear Mr. Davis:

Re: ADM File No. 2005-19
Jury Reform Proposals

Based on my 30 years at the bar and bench, I strongly support the Jury Reform Proposals. I would also like to share some more specific comments regarding selected proposals.

Juror Questions

I have allowed the Jurors to ask questions in many civil and criminal cases based on case law. I have written an article about the procedure, a copy of which is attached. I have been able to ask most of the questions submitted. Sometimes the attorneys and I agree at the bench without any controversy that a question cannot be asked. A few questions are minor clarifications on the attorneys questioning, and others address new areas. In my opinion, the jurors are more attentive when they are allowed to ask questions. In civil cases the questions have on several occasions resulted in more serious settlement discussions by the parties. The practice is easy to administer and does not result in any measurable delay of the trial.

Criminal defense attorneys have objected to the practice because they believe this results in "13 prosecutors." Since the prosecution has the burden of proof and the Defendant usually benefits from uncertainty, the argument goes, allowing a juror to ask a question may resolve that uncertainty and allow that juror to conclude beyond a reasonable doubt that the Defendant is guilty. For example, in a possession of cocaine case, a juror, after having watched lots of new criminal investigation TV shows, may wonder if the baggie that contained the cocaine had the Defendant's fingerprints. If the prosecutor fails to ask the police any question about fingerprints or fingerprint testing, this may leave an unresolved question in the juror's mind. But, if the juror asks whether the police submitted the baggie for fingerprints, and if not, why they did not do so, the juror's concern may be resolved by an answer that baggie's generally do not yield fingerprints, so the officer did not believe it was worth the effort. However, even assuming that this is a valid criticism, the juror question does not result in the conviction of an innocent person, but simply compensates for a less than thorough presentation by the prosecution.

Juror Discussions

I think most jurors are puzzled by the instruction that prohibits from discussing the case during the trial with other jurors. Judges are essentially telling the jurors not to discuss a witness's testimony when it is freshest in their mind, but wait until the end of the trial.

This reform will result in jurors discussing testimony when it is freshest in their mind and should result in more accurate discussions. The final jury deliberations should also be shorter because the jurors will presumably have used some of their down time to discuss some aspects of the case.

Depositions

This suggestion is well-intentioned, but my experience would suggest it is impractical. Attorneys often struggle to resolve deposition objections and I believe it will probably take the attorneys much longer to agree on a written summary than it will to read the entire transcript. I expect that in many cases the attorneys will simply be unable to agree on any written summary.

Expert Testimony

I believe this is also a good idea that is unfortunately impractical. Experts' schedules are difficult to arrange, and experts' time is expensive.

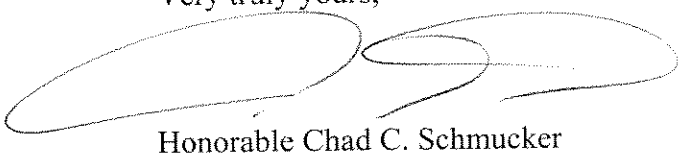
Interim Commentary

I support this idea because I believe it will greatly increase juror attention and comprehension. This could be accomplished in a number of ways. In a several day trial, the attorneys could be allowed 5 minutes at the beginning of each day to comment on what occurred the day before or outline what will occur in the upcoming day of trial. This could make the initial opening statement shorter. This would be unnecessary in a 2 day trial, and perhaps a 3 day trial, but would certainly be of juror assistance in trials that last 1 or 2 weeks.

In my opinion, all of the proposals would increase juror attention and comprehension. I do not see how any of the proposals will affect the fairness or integrity of a civil or criminal case. Although some of the discretionary proposals may seldom be used, the procedures would be helpful in the cases where they are utilized.

Thank you for allowing me the opportunity to provide you with comments on these proposed reforms.

Very truly yours,

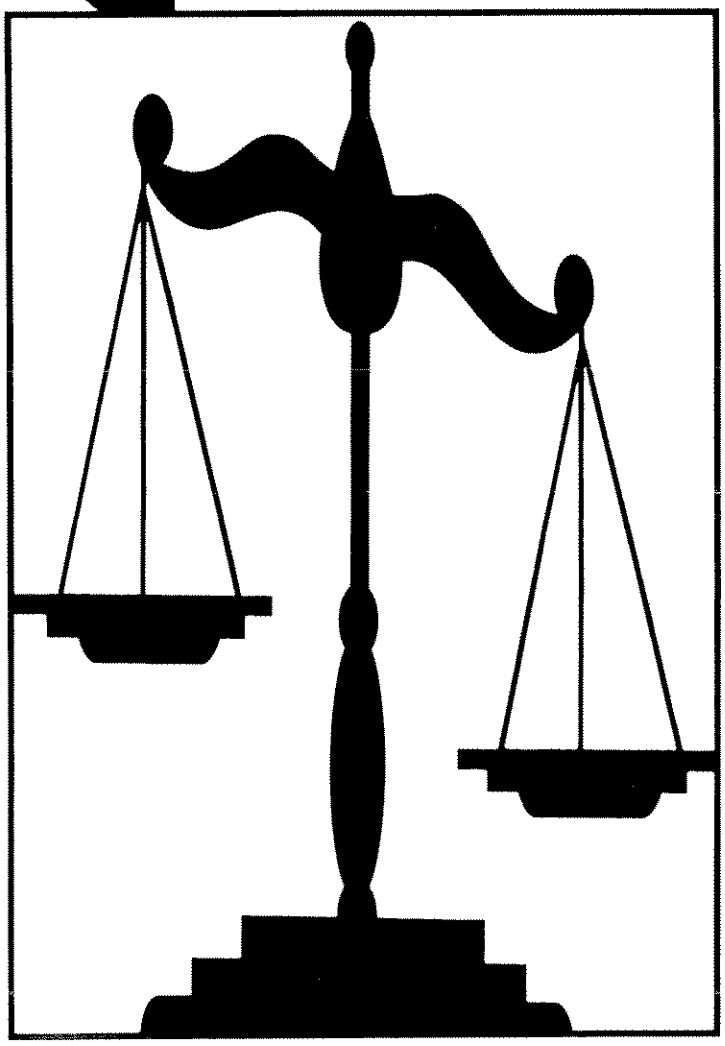


Honorable Chad C. Schmucker
Chief Circuit Court Judge

CCS/psc

MICHIGAN DEFENSE TRIAL COUNSEL, INC.
ASSOCIATION OF DEFENSE TRIAL COUNSEL

MICHIGAN DEFENSE QUARTERLY



FEATURES

- Peremptory Challenges of Minority Jurors
- Allowing Jurors to Question Witnesses
- Review of "Michigan Non-standard Jury Instructions"
- The Post-Verdict Juror Interview
- Finding *Actual* Prejudice from Juror Bias or Misconduct

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INNOVATIVE USES OF THE JURY —A TRIAL JUDGE'S PERSPECTIVE

by: Hon. Chad C. Schmucker

Jurors decide cases but are expected to remain silent in the courtroom from the end of voir dire until a verdict is announced. I believe that jurors can and should be allowed to participate. I allow all jurors to ask questions and in order to assist settlement, some jurors are allowed to share their opinions prior to the verdict.

Some commentators have discouraged judges from allowing the practice because it serves no worthwhile purpose and disrupts the orderly trial procedure. My experience suggests otherwise.

ALLOWING JURORS TO ASK QUESTIONS

The law is well settled that judges have discretion to allow jurors to question witnesses.[1] Indeed, Standard Jury Instructions have been adopted for both criminal and civil cases. CJI2d 2.9; SJI2d 2.11. The civil instruction provides:

> During the testimony of a witness, you might think of an important question that you believe will help you better understand the facts in this case. Please wait to ask the question until after the witness has finished testifying. If, after the witness has completed testimony, and only then, your question is still unanswered, you may write the question down, raise your hand, and pass the question to the bailiff. The bailiff will give it to me. Do not under any circumstances ask the witness the question yourself.

There are rules that a trial must follow. If your question is allowed under those rules, I will ask the witness your question.

Few judges, however, allow the practice and most judges have not even been asked to consider the procedure. This article will briefly explain the advantages of allowing jurors to ask questions.

It should be remembered that this practice is not widely accepted and that many practitioners and judges believe questioning by jurors is unnecessary and dangerous. In Pierre v Florida, 601 So2d 1309 (Fla App, 1992), the Florida Court of Appeals affirmed the trial judge's discretionary decision to allow juror questioning, but made the following comment:

> While allowing jurors to ask questions of witnesses is permissible, it is hard to discern the benefit from such a practice when weighed against an endless potential for error.

Some commentators have discouraged judges from allowing the practice because it serves no worthwhile purpose and disrupts the orderly trial procedure. My experience suggests otherwise. Juror questioning has been allowed in all civil and criminal cases in my court for the last three years. To my knowledge, the propriety of the practice has not been appealed in any of my cases.

Although I started using the practice before the Standard Jury Instruction was adopted, I always followed that procedure. In addition, I have adopted the following safeguards:

1. Attorneys are invited to the bench to review the questions before they are asked.

2. Attorneys are allowed to make objections outside of the presence of the jury.

3. All questions, regardless of whether they are asked, are made a permanent part of the Court file.

4. Follow-up questions are generally not allowed although on occasion a few brief follow-up questions are permitted.

There are several advantages to juror questioning, both for the Court, the attorneys, and the parties.

First, although many questions duplicate what was already asked by one of the attorneys, the procedure does not prolong the trial. The juror simply didn't understand or hear the answer and wants it repeated. A large portion of the questions involve simple, straight-forward answers, such as, are you right-handed? Did the car have an automatic transmission? Do you wear glasses or contacts? There are very few requests to place objections on the record. I have only had one question objected to. I ruled on it from the bench, and the objection was put on the record later.

Second, juror comprehension is increased. If they want an answer repeated or want to find out if a person was right-handed, letting them hear the information allows them to concentrate on other matters. Juror deliberations are shorter and the requests to read back testimony are fewer when jurors are allowed to ask questions. As such, the procedure does not lengthen the trials but shortens them.

Third, the questions often suggest the impression the juror is forming. This aids the attorneys in determining how to present the balance of the case and how to argue the case to the jury. More settlements occur during trials when this practice is used.

One example of when a juror's question sparked settlement negotiations occurred in a recent personal injury case. A well known vocational rehabilitation expert testified about the plaintiff's diminished earning capacity and concluded that the loss was approximately $30,000 per

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year. Unfortunately, at least one juror was not buying the testimony. This middle-aged plaintiff had a sporadic work history which involved a substantial amount of self-employment. A juror questioned whether the vocational rehabilitation expert had actually seen the plaintiff's W-2s. Shortly after the witness answered that he had not seen any W-2s or income tax forms, the case settled.

Over 25 percent of my civil cases settle during trial. Although my ongoing settlement conferences are partly responsible, the juror's questions assist the attorneys in determining how individual jurors are leaning. How many times has a trial attorney been encouraged by a juror's nodding, notetaking, or attentiveness? Although sometimes these hunches are correct, reading body language is not nearly as effective as hearing the juror's questions. Most defense attorneys would like to know prior to the verdict if a juror finds the plaintiff's case credible and is leaning toward a plaintiff verdict.

Since the defense presents its case last, this procedure may slightly benefit the defendant if the defense has some flexibility in the case that is presented. The witnesses, exhibits or questioning may change. This procedure certainly favors skilled and flexible counsel over unskilled and inflexible counsel. If this is your first trial and you have written out all of the questions you are going to ask and are too nervous to alter the presentation, this procedure may benefit your opponent more than you.

In many cases the defense case is more complex and relies more on facts than on sympathy. Do you want to increase juror attentiveness and comprehension? Most attorneys regret juror confusion. Oftentimes losses are explained by the fact that "the jury was confused and didn't understand the evidence." I have never heard an attorney explain an unfavorable verdict by stating, "The jury understood the evidence. I was unable to confuse them."

I favor allowing jurors to ask questions because it increases juror comprehension, promotes settlements during trial, does not extend and perhaps decreases trial time, and allows the skilled advocate to adjust the presentation based on perceived juror impressions.

Although the practice has been criticized in the past, many newer publications have commended the practice.[2] My post-trial questionnaires suggest that the jurors favor this practice, as well.

If your trial judge has not allowed this practice in the past, it is unlikely the judge will be receptive to changing the normal procedure if the change is suggested on the morning of the start of the trial. Requests and inquiries about allowing jurors to ask questions should take place earlier, either at pretrial or perhaps in a motion requesting that the court exercise its discretionary authority to allow the questions.

JURY ASSISTED SETTLEMENT : A MODIFIED SUMMARY JURY TRIAL

Most judges explore every reasonable method for settling cases prior to trial. Mediation is routine across the state. Settlement conferences are regularly conducted by most judges. Summary jury trials are occasionally conducted by a minority of judges.

The procedure for settlement conferences varies from judge to judge. Some judges have no intention of actively participating and simply order the attorneys and the parties to appear and require them to go to a conference room to discuss the case. This type of hands-off procedure is seldom effective, and to the extent that it settles some cases, it is very likely that the cases would have ultimately settled even without a settlement conference.

In some courts, the judges take a very active role in settlement conferences. The court file, trial briefs, and/or mediation summaries are reviewed before the conference. The judge meets with all counsel to discuss the case and then meets with individual attorneys who are sometimes accompanied by their clients. Judges require that parties and insurance adjusters attend the settlement conference.[3]

Timing and active judicial involvement are the two most significant facts in a successful settlement conference. It also requires a substantial commitment of judicial time. If the judge has not reviewed the file and does not understand the case, but simply shares "war stories" and attempts to have the parties "split the difference," the chances of success diminish. Generally, the closer a settlement conference is to the day of trial, the more likely it is to be successful.

Summary jury trials conducted pursuant to Administrative Order 1988-2 are very effective. Although I have only used this technique twice, it has been successful on both occasions. A summary jury trial, however, takes most of the day, and often results in adjourning a trial in order to conduct the summary trial. Realistically, summary jury trials cannot be expected to resolve more than half the cases. If the cases that are selected for this procedure would have used one to three weeks of trial time, then the expenditure of a day on a summary jury trial is worth the effort. On the other hand, many civil jury trials can be completed in three days and a full summary jury trial is probably not an effective use of time for those cases.

I have recently developed a modified summary jury trial procedure as an alternative to settlement conferences and a full summary jury trial. The procedure has settled all three cases in which I have used it.

At pretrial, the attorneys are advised that a settlement conference will be conducted immediately after the completion of opening statements. Counsel are advised that not only should the parties be present for jury selection and opening statements but that any person who is advising the party about settlement or has the authority to authorize or approve a settlement should also be present.

A total of nine jurors are selected, and the parties are allowed one additional peremptory challenge. After opening statements, two jurors are randomly selected. The remaining seven jurors are excused from the courtroom. The two remaining jurors are discharged from the jury, are asked to complete a preliminary verdict questionnaire inquiring whether they are leaning toward a plaintiff verdict or defense verdict, and if they return a plaintiff

verdict whether they are considering a low, average, or high award.

After completing the forms, the judge conducts a discussion with the jurors regarding their impressions of the case. After the discussion, the two jurors are sent home and the settlement conference is conducted. If the settlement conference is unsuccessful, the trial continues. The seven remaining jurors are brought into the courtroom and plaintiff's first witness takes the stand.

This procedure has been used three times. The first case was a medical malpractice case involving a serious hip injury, the second case a slip and fall involving a herniated disc, and the third case a slip and fall involving a serious wrist fracture. The first two cases settled within one hour of the jury discussions. In the third case, the parties came to within $5,000 of settling the case but were unsuccessful in reaching an agreement. The trial proceeded with the plaintiff calling witnesses. After a night of reflection, the parties continued their discussions on the second morning of trial and the case was settled before the jury was brought into the courtroom.

This procedure has several advantages over a traditional settlement conference and an AO 1988-2 summary jury trial:

1. Studies suggest that many jurors form impressions at opening which do not change.

2. The jurors sharing their preliminary opinions are randomly drawn from the actual jury panel.

3. The time to bluff and delay is gone since the trial will continue immediately if the case is not resolved.

4. The comments from actual jurors are far more important to the parties and attorneys than stories and platitudes told by a trial judge during a settlement conference.

5. Many attorneys have an unrealistic expectation of the strength of their case at an early settlement conference and they are more likely to have realistically appraised the strengths and weaknesses of their case on the first day of trial.

6. If the case does settle, the whole procedure has probably only taken an extra 60 to 90 minutes. Even if the case does not settle, the attorneys may find the jurors' comments instructive and it may assist them in their case presentation.

Comments from actual jurors are far more important to the parties and attorneys than stories and platitudes told by a trial judge during a settlement conference.

7. The procedure better utilizes limited judicial resources. Some of the cases in which early settlement conferences are conducted and summary jury trials are held would settle even without those procedures. This procedure is only used as a last resort when the parties have not been able to settle the case on their own.

8. My experience has been that the closer a settlement conference is to a trial date, the more likely it is to be successful. As such, this is the ultimate settlement conference because with this procedure all pretrial motions have been resolved, the trial briefs have been read, the jury has been picked, and opening statements have been delivered to the jury.

However, there are some disadvantages. Although judicial resources are conserved, the parties still incur costs and attorney fees in preparing for trial. Voir dire and openings take several hours so it is unlikely the case will be settled until the early afternoon.

This procedure is not specifically authorized by Administrative Rule 1988-2. However, the parties and attorneys thus far have not objected to this procedure. There are no sanctions if the procedure is unsuccessful. The seven jurors who will hear the case are not contaminated in any way. The fairness and integrity of the resulting trial are unaffected. The use of this procedure is unlikely to be sufficient grounds for a new trial.

1 "Should Jurors Ask Question?", Michael D. Wade, *Michigan Bar Journal*, March 1992, page 322. See also The Inherent Dangers of Allowing Jurors to Question Witnesses, *7 Cooley Law Review* 213.

2 "Charting a Future for the Civil Jury System," Report from American Bar Association/Brookings Symposium, 1992; "Litigation News," June-July 1995, Vol. 20, No. 5, "Should Jurors Be Allowed to Submit Questions to Witnesses" by Brian J. Holzberg.

3 See, Kornak v Auto Club, 211 Mich App 416 (1995), regarding limitations on the court's authority torequire attendance at settlement conferences.

JUDGE CHAD SCHUMCKER is a graduate of the University of Michigan and Wayne State University Law School. He practiced law with the firm of Best, Schmucker, Heyns & Klaeren from 1977 to 1991, specializing in personal injury litigation. He was appointed to the bench in 1991 by Governor Engler and was elected to a six year term in 1992.